No. 10351.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NAT ROGAN, COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF CALIFORNIA,

Appellant,

vs.

JAMES A. KAMMERDINER, INDIVIDUALLY AND AS SURVIVING JOINT TENANT OF MYRTLE B. KAMMERDINER, DECEASED,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

Opinion Below.

Appellant's statement is correct.

Jurisdiction.

Appellant's statement of jurisdictional facts is correct.

Questions Presented.

1. Whether any of the patents issued or assigned to appellee constituted assets of the Kammerdiner rotary jar business.

2. Whether the entire properties contributed to the Kammerdiner rotary jar business "originally belonged" to appellee, within the meaning of section 302(e) of the Revenue Act of 1926, as amended.

3. Whether all property, if any, contributed to said Kammerdiner rotary jar business by the deceased wife of appellee was acquired by her from appellee without the payment of an adequate or any consideration therefor in money or money's worth.

Statutes and Regulations Involved.

Applicable statutes in addition to those printed in the appendix to appellant's brief are:

1. Sections 162, 163 and 164 of the Civil Code of California, the pertinent parts of which read as follows:

> §162: "*Separate property of the wife.* All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. . . ."
>
> §163: "*Separate property of the husband.* All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property. . . ."
>
> §164: "*Property acquired after marriage.* . . . All other property acquired after marriage by either husband or wife, or both, . . . is community property. . . ."

2. Section 2401(2), Civil Code.

Statement.

This statement is made for the reason that parts of appellant's statement (pages 3 to 17, inclusive, of his brief) are controverted.

The controverted parts of his statement consist largely of facts which, in his opinion, are established by the evidence but different from the facts found by the Court to be established by said evidence. For the sake of brevity we will not set out herein facts stated by appellant and not controverted, but will confine our statement to the controverted facts and cite the pertinent parts of the record at the points in the Argument in relation to said controverted facts.

In our opinion the taxpayer and his wife did not enter into any agreement at the time of their marriage or at any other time prior to April, 1923, in regard to the ownership of the earnings and property which they might acquire.

The patents issued to taxpayer for the "Kammerdiner rotary jar" [R. 102, 106, 148, 207, 208, 262, 433, 444, 445, 446, 447] were necessarily gifts to him by the Government. The Government does not sell patents. No part of said patents was assigned to or owned by taxpayer's wife or the Kammerdiner rotary jar business.

The profits saved from the boarding house operated by taxpayer's wife amounted to more than $3,000.00 [R. 98, 201, 443], but they were not her property. They were community property.

There was never, at any time, an agreement that the profits or losses of the Kammerdiner rotary jar business should be divided equally or in any other proportion. The agreement [R. 44] was that the business and all increase or change thereof should be "their joint property with right of survivorship."

Some of the additional patents acquired by taxpayer were issued to him by the Government and some of them were purchased by him and regularly assigned to him (not to the business or to taxpayer's wife) and thereby became his property.

Any property acquired by taxpayer and his wife or either of them after the creation of the joint bank accounts "was paid for with money which they both owned" as joint tenants.

The written agreement of January 3, 1928, merely reduced to writing the oral agreement of 1923. [R. 103-105.]

As stated by appellant on page 12 of his brief, the Court found that the fair market value of one-half of the Kammerdiner rotary jar business and its assets was $160,000.00. This finding was made on the assumption that all of the patents issued or assigned to taxpayer were owned by the business. [R. 10, 15, 49, 95.]

The findings referred to by appellant in the note on page 14 of his brief are findings of the ultimate facts on which the judgment is based.

Statement of Points to Be Urged.

1. All of the patents issued or assigned to appellee on tools used in the Kammerdiner rotary jar business were at all times owned by appellee and never at any time owned by the Kammerdiner rotary jar business or by appellee's deceased wife, and therefore constitute no part of her gross estate.

2. The entire capital contributed to the Kammerdiner rotary jar business "originally" belonged to appellee.

3. The wife's interest, if any, in any contributions to said rotary jar business or its capital was acquired from appellee for no consideration whatever "in money or money's worth," so that no part of the value thereof is includible in her gross estate.

4. Points 1, 2 and 3 constitute the material findings of the Trial Court and are supported by substantial testimony and therefore these findings will not be disturbed on appeal.

ARGUMENT.

I.

All of the Patents Issued and Assigned to Appellee on Tools Used in the Kammerdiner Rotary Jar Business Were at All Times Owned by Appellee and Were Never at Any Time Owned by the Kammerdiner Rotary Jar Business.

Decedent at the time of her death owned with appellee the Kammerdiner rotary jar business, as joint tenants with the right of survivorship, under a written agreement dated January 3, 1928. This is alleged in the Complaint [R. 9], admitted by the Answer [R. 48], and found by the Court [R. 59].

However, the testimony showed that this written joint tenancy agreement did not change in any particular a joint tenancy oral agreement entered into in April, 1923 [R. 104, 200, 259, 260, 265, 453, 454, 455, 456, 465, 476], and the reason given for reducing the oral joint tenancy agreement to writing was that the taxing authorities would not allow them to "split the [income] tax" unless they did so. [R. 202.] The Court in its Minute Order, ordering judgment for plaintiff states:

> "The joint tenancy was created in 1928, confirming the oral agreement in 1923 . . ." [R. 54.]

In other words, the joint tenancy existed from April, 1923, but we must look to the written agreement of January 3, 1928, for its terms. Appellant finds no fault with this holding but on pages 20, 21 and 22 of his brief in-

sists that the joint tenancy existed not only from April, 1923, but from the instant of the marriage of decedent and appellee, so that not a penny of the earnings of either from the date of marriage until the wife's death was originally community property, although the only money earned by either of them from 1908, the date of marriage, until April, 1923, the date of creation of the Kammerdiner rotary jar joint tenancy business, was for his services as oil well driller and hers as boarding house operator. [R. 98, 109.]

For the purposes of this part of the argument we will assume that by the joint tenancy agreement of April, 1923, a partnership was formed. If it was a partnership, however, it was one in which the business and profits were not owned in moieties but by the partners and the survivor as joint tenants by the terms of the agreement as reduced to writing. We take it that there is no reason why partnership assets and profits may not be owned in joint tenancy in California. Section 2401(2) of the Civil Code provides:

> "Joint tenancy . . . does not *of itself* establish a partnership, whether such co-owners do or do not share any profits made by the use of the property;" (Italics supplied.)

Can it be doubted under that language that a joint tenancy partnership can be formed if that is the intent?

It is not uncommon in a partnership for the property of one of the partners to be used for partnership purposes

without becoming a part of the firm property and whether it does or not must be determined from the partnership agreement. *Perelli-Minetti v. Lawson,* 205 Cal. 642, 647.

In April, 1923, none of the patents had been issued and only one, the basic patent, had been applied for. Not a word is said about this patent or any patent in the agreement as later reduced to writing. The testimony shows that appellee did not consider that he had transferred any patent to the business partnership. When he was asked on cross-examination in reference to his wife's interest: "Now, that related to patents . . . did it not?", his answer was: "There was no way of transferring that to her." [R. 203.] This is not quoted as proof of the facts stated, but as appellee's opinion.

Furthermore, the business was operating successfully under the protection of the basic patent and many others before there was any written agreement whatever. There was, therefore, no written assignment of any of the patents, without which no title could pass under the federal law which governs on this point. *Owen v. Paramount Productions,* 41 F. Supp. 557; Title 35, U. S. C. A. Sec. 47, which provides: "Every patent or any interest therein shall be assignable in law by an instrument in writing, . . . ". Other properties could be assigned or transferred orally but not these patents.

Plaintiff (appellee) in paragraph XIII (b) of his complaint [R. 10] alleges:

> "That the Commissioner of Internal Revenue erred in including as an asset of said rotary jar business the patents issued to and owned by Plaintiff and

securing to him the sole right to manufacture said rotary jars."

Finding V (b) is [R. 59, 60]:

"That the Commissioner of Internal Revenue erred in including as an asset of said rotary jar business the patents issued to and owned by plaintiff and securing to him the sole right to manufacture said rotary jars."

We are not interested in whether a contrary finding by the Court could have been sustained. The finding was clearly based upon substantial testimony and therefore will not be disturbed by this Court. These patents therefore remained his property.

In this connection it is interesting to note that the Internal Revenue Agent in charge of the Los Angeles office of the Treasury Department in his report in regard to the income tax returns of Mr. and Mrs. Kammerdiner for the year 1928 [R. 269] says in regard to the written agreement of January 3, 1928 [R. 273]:

"The principal asset of the business is the patent which was obtained by the husband in 1923 and under the protection of which he manufactures the 'Rotary jar' which produces the income. *This patent has never been assigned by J. Kammerdiner and remains his separate property to continue to hold or to dispose of as he may see fit.*" (Italics supplied.)

In this connection see also *Anderson v. Carkins,* 34 L. Ed. 272.

II.

The Entire Capital Contributed to the Kammerdiner Rotary Jar Business Originally Belonged to Appellee and Any Property Contributed Thereto by Decedent Was Obtained by Her From Appellee Without the Payment Therefor of an Adequate or Any Consideration in Money or Money's Worth.

We have already shown that there was ample evidence to support the Court's finding that the patents were not assets of the Kammerdiner rotary jar business.

Appellant does not contend that the ultimate findings in regard to the wife's interest in the rotary jar business, finding V (d) [R. 60], are not sufficient to support the judgment, but contends [note page 3], that these ultimate findings are not supported by the evidence. He opens his argument on this point with two statements, neither of which is entirely correct. On page 18 he states that under the pertinent section of the Revenue Act "one-half of the value of the rotary jar business was *prima facie* includible in the wife's gross estate, because it was owned in joint tenancy" and on page 15 he says: "Exclusion of the amount from the gross estate can be secured only by a clear showing that no part of the business originally belonged to the wife." We find, however, that Regulations 80, Art. 23, printed in the appendix to his brief, page 3, provides: "The entire value of such property is *prima facie* a part of the decedent's gross estate.", and in *Foster v. Commissioner* (C. C. A. 9th), 90 F. (2d) 486 we find that under this presumption all of such joint tenancy property must be included in the gross estate of whichever joint tenant first dies in the absence of any

evidence to overcome the presumption. On the other hand, we are told in the Law of Federal Income Taxation by Jacob Mertens, Jr. (1943) Vol. 9, page 296, §50.71:

> "The presumption that the Commissioner's assessment of the tax is *prima facie* correct means no more than that, in the absence of evidence to the contrary, his action will be upheld, but, once there is such contrary evidence, this presumption vanishes and the case is wide open. This presumption is what is often termed a 'true' presumption and is not evidence itself, but merely shifts the burden of *going forward with,* as distinguished from the *actual burden of,* proof; and once the burden of *going forward with* the proof is met, it is as though the presumption had never existed."

This statement of the law is supported by *Wiget v. Becker* (C. C. A. 8th), 84 F. (2d) 706 and *J. M. Perry & Co., v. Commissioner* (C. C. A. 9th), 120 F. (2d) 123, in which case it is said on page 124:

> "The Commissioner cannot rely upon his determination as evidence of its correctness either directly or as affecting the burden of proof."

The Complaint alleges, paragraph I [R. 2], that decedent at the time of her death owned property in joint tenancy with plaintiff. The answer, paragraph I [R. 47] admits this, and the Court finds accordingly, finding I [R. 56]. Consequently, all of this joint tenancy property would be a part of her gross estate in the absence of testimony to the contrary. To meet this situation, the plaintiff testified [R. 98] that he had not to exceed about two hundred dollars ($200.00) at the time of marriage and his wife nothing, and that neither of them received any

property of any kind thereafter up to 1923 except his salary in drilling oil wells and the net income of the boarding house operated by his wife on a lease on which he was drilling wells, all of which was deposited in joint bank accounts and invested in other properties, and finally it or its proceeds furnished the capital for the Kammerdiner rotary jar business started in April, 1923, under an oral agreement and continued from January, 1928, to the date of decedent's death under the same agreement reduced to writing in January, 1928.

We start, then, with the presumption that the Commissioner's finding that one-half of the joint tenancy business was originally owned or contributed to the business by decedent is correct. This would necessitate a judgment for the Government if no evidence were produced. As soon, however, as it was shown that all of the money finally finding its way through joint bank accounts into the business was originally earned by the spouses after marriage in payment for their personal efforts, this evidence with the presumption contained in Section 164 of the Civil Code overcomes the presumption of correctness and in the language of *Wiget v. Becker, supra*, "the presumption is out of the case, and the issue is open."

This evidence also *prima facie* overcomes the presumption that the contributions to the joint tenancy business were originally the property of decedent. *In re Boody*, 113 Cal. 682. In that case it was held that the presumption is that property acquired during marriage

> "was community property, and this presumption could be overthrown only by evidence of a clear, certain and convincing character establishing the contrary; and the burden of this showing rested with the parties

> claiming the separate character of the property. In the absence of such proof, the presumption as to the community character of the property was absolute and conclusive. . . ."

To the same effect is *Fennell v. Drinkhouse,* 131 Cal. 447.

Such evidence not only overcame the burden of going forward, but conclusively established the original nature and ownership of the properties constituting the joint tenancy business, unless overcome by "evidence of a clear, certain, and convincing character establishing the contrary; and the burden of this showing rested with the parties claiming the separate character of the property."

Appellant claims that he has met this burden by certain evidence of appellee. He claims, on page 22 of his brief, that this evidence shows that an oral agreement at the time of marriage established a joint tenancy in all property thereafter acquired by either spouse, so that there never was a dollar of community property at any time. In this connection it will be noted that the Commissioner of Internal Revenue found directly to the contrary in his letter of November 10, 1937 [R. 17] sustaining a protest against the inclusion in the gross estate of certain items of joint tenancy property. The reason given by the Commissioner for sustaining the protest is as follows [R. 18]:

> "The evidence submitted indicated that the property represented by these items was purchased with community funds acquired prior to July, 1927, in which the wife had a mere expectancy and she made no contribution to the purchase of the jointly owned property."

We are not concerned with the sufficiency of the evidence to support a finding if it had been made by the Court, that there never was at any time any community property. The finding of the Court is directly to the contrary and must be sustained if supported by substantial evidence. This, we believe, is the law both federal and in the various states. Thus, in *Anderson v. Commissioner* (C. C. A. 9th), 78 F. (2d) 636 at 638, the Court says:

> "In the case of an express finding of the ultimate fact by the Board of Tax Appeals, the only question for the consideration of the reviewing Court is whether or not such a conclusion is supported by substantial evidence."

The same conclusion in *Estate of Schabiagne,* 47 Cal. App. (2d) 793, is expressed in these words on page 800:

> "It is not the province of this Court to weigh the evidence . . . and even should we be of the opinion that the finding should have been otherwise, unless there is a total absence of competent evidence to sustain the finding, we cannot reverse the trial court . . .
>
> "The question for this court is not how we would have determined the facts, but whether there is substantial evidence supporting the conclusion of the trial court."

In contending that the ultimate facts found by the Court are not sustained by the evidence, appellant refers to parts of the testimony of appellee from which he concludes that by agreement all property of the spouses was owned by them from the instant of marriage in joint tenancy with the right of survivorship and that therefore each of them

should be deemed to have originally owned one-half of the contribution to the Kammerdiner rotary jar business within the meaning of the Revenue Act.

It was for the Court, however, to determine the meaning of the evidence given by the witness and also the weight to accord it. In so doing, the Court noted particularly [R. 205] the kind of English spoken by the witness and doubted if he could understand half of the words the lawyer uses, unless they were explained to him in words of one syllable, and says: "He is a man of little schooling."

The witness was asked [R. 265] if in 1923 or 1928 he knew the difference between community property, joint tenancy property, partnership, partnership property, or other property, and replied: "After all the wrestling I have gone through, I don't know the difference today." He testified [R. 260] that there was no understanding with his wife about 1923 that if they made any money they would divide it. The wife's affidavit to petition relative to income tax return states [R. 256] that her understanding was that the spouses "were in partnership in the patent rotary jar business as in everything else since marriage." In a similar affidavit by the husband he states [R. 255]: "His wife has acted as his partner in his business *as well as in his home.*" (Italics supplied.)

The witness, when asked what he meant when he said he and his wife "formed a partnership," [R. 216] replied: "Well, I think any married couple that are married and married right have got a partnership right off the bat." Also, he testified in regard to the so-called partnership [R. 206, 207] that there was no agreement to divide profits and losses. When asked [R. 200] if the partner-

ship or joint tenancy agreement was entered into at date of marriage, he replied: "We didn't think so much of it until the jar business came along." Also, when asked if the agreement wasn't made in 1928, he replied: "We made that agreement at the start of the jar business, '23." When asked [R. 201] if he and his wife always considered that they owned their profits "50-50", he replied: "Well, that is the only thing we figured out, but it was lined up after we got the jar business . . ." He testified [R. 201] that the savings from his salary and the earnings from the boarding house all went into one joint account.

There is no need of multiplying excerpts from the testimony. It seems clear that the Court could reasonably conclude from all the testimony that taxpayer and his wife were a couple loyal to each other who felt that the marital property should be owned by both and the survivor. That he worked for a salary and she operated a boarding house and they deposited all savings in a joint bank account out of which they later financed the Kammerdiner rotary jar business in 1923 in which they both worked. The profits from this business were large and they were faced with income tax problems. They felt that under the marital partnership, as they understood it, they should each be allowed to return one-half of the net income for income tax purposes and did file separate returns for several years prior to 1928. They endeavored without success to convince the taxing authorities that they constituted a partnership and should be allowed to file separate returns. The Government refused to recognize any partnership unless and until they had a written partnership agreement. During all of this time they had not employed

lawyers to advise them or prepare their returns. Finally, on January 3, 1928, they executed a written so-called partnership agreement which, according to the testimony, simply reduced their oral agreement of 1923 to writing, not changing the agreement one iota, and this agreement continued until the wife's death. That is what the Court did find. When taxpayer and his wife refer to a partnership existing prior to April, 1923, they clearly mean a partnership by virtue of being married, the kind of partnership referred to in *Ord v. De La Guerra* (1861), 18 Cal. 67 at 74; and *Lynam v. Vorwerk* (1910), 13 Cal. App. 507 at 509. In the first case the Court in speaking of the husband's ownership of the community property after his wife's death, says: "The husband holds really as survivor of this matrimonial copartnership . . .". In the other, the statement is: "The relation of husband and wife as to their property is somewhat in the nature of a partnership, where there is usually partnership property and the separate property of the copartners." The Court calls the community property "partnership property."

The ultimate facts, therefore, amply supported by the evidence, upon which the judgment was based, were that at the time of decedent's death she owned the joint tenancy business in joint tenancy with her husband, appellee herein, and that the contributions to said business originally belonged to appellee and no part thereof was ever acquired by decedent from appellee for an adequate consideration in money or money's worth. The Court in its minute order, as hereinbefore, and on page 23 of appellant's brief stated, found that the written joint tenancy agreement of 1928 simply confirmed the oral agreement of 1923, in other words, that the joint tenancy agreement

in effect at the date of decedent's death was not first created in 1928 but was created in 1923 and existed from that time until decedent's death, part of the time under the oral agreement and the balance of the time under the written agreement, executed because [R. 202] the taxing authorities would not recognize the oral agreement and permit them to split the income tax.

The crucial finding is finding VI [R. 60, 61]. The finding is not that the joint tenancy business in effect at the date of decedent's death was created in 1928 but that it was "referred to in said agreement of January 3, 1928." In other words, they were conducting a business and for the reasons hereinbefore stated made a written statement in regard thereto on January 3, 1928. This is in accordance with the written statement itself. The statement [R. 44] is in regard to "the business . . . heretofore conducted by them," and the statement is that it "is now and all increase or change thereof shall be, their joint property with right of survivorship."

It was not necessary for the Court to find the evidentiary facts, including the date of the creation of the joint tenancy business existing at the decedent's death, or what funds *immediately* created said joint tenancy business. It is, as suggested in the note on page 3 of appellant's brief, for this Court to decide whether "the District Court's ultimate findings crumble when the evidentiary facts are considered." What does the evidence show? That the written agreement of January 3, 1928, reduced to writing,

without changing, the oral agreement of April, 1923. That the funds going into the joint tenancy business created in 1923 and referred to in the written agreement of 1928, were taken from the joint account of the spouses, made up entirely of their earnings since marriage, for their personal services.

The taxing statute set out on pages 1 and 2 of the appendix to appellant's brief clearly excepts from the tax the part of the joint tenancy property *originally* belonging to the survivor. If this means belonging to the survivor *immediately before* being invested in the joint tenancy under consideration, then the survivor could never be taxed where the funds invested are taken from a joint bank account of the joint tenants because the *entire* joint bank account belongs to *each* joint depositor and the survivor, regardless of who originally owned the funds constituting the joint account, and remains the property of the survivor, who takes nothing from the deceased joint tenant. This has always been the common law and the law of California. *Hannon v. Southern Pacific R. R. Co.*, 12 Cal. App. 350, 355; *Estate of Gurnsey,* 177 Cal. 211, 216; *Siberell v. Siberell,* 214 Cal. 767, 769. The statute therefore does not provide for a tax on the part of the joint tenancy property which before going into joint tenancy was *originally* owned by the survivor. This idea is expressed in Treasury Regulations 80, Art. 23, set out on page 3 of the appendix to appellant's brief as follows:

> "But it is not the intent of the statute that there should be so included a greater part or proportion

> thereof than is represented by an outlay of funds, which, *in the first instance,* were decedent's own . . . " (Italics supplied.)

In the argument so far it is not contended that the spouses cannot enter into a valid agreement that the earnings of each shall be his or her separate property. *Helvering v. Hickman* (C. C. A. 9th), 70 F. (2d) 985. We respectfully submit, however, that the facts in the instant matter are more nearly akin to those in *Blair v. Roth* (C. C. A. 9th), 22 F. (2d) 932, and *Belcher v. Lucas* (C. C. A. 9th), 39 F. (2d) 74, in both of which it was held that the earnings of both spouses "became community property before the agreement became effective." In *Helvering v. Hickman,* on page 988, both of these cases are distinguished for the reason that:

> "In neither case was there a clear-cut agreement that the wife should have her own earnings as her separate property; in both cases there was a partnership agreement by which the earnings of both were joined in one fund to pay expenses of both and remainder only was to be owned equally."

In the instant matter there is no evidence whatever that there was ever at any time any agreement that the wife's earnings should be her separate property. Their earnings always went into a joint tenancy out of which all business and living expenses were paid and the balance owned as joint tenants.

III.

Decedent Did Not Purchase Her Interest in the Kammerdiner Rotary Jar Business.

Appellant argues that she did. He states on page 31 of his brief:

> "But the wife also paid consideration in money's worth in the form of services for her interest in the business."

The argument is that they agreed in effect that she should acquire an interest in the partnership as payment for her agreed services. It is conceded that the spouses could by clear language agree that the wife should be paid for services of the kind performed by her. It is also conceded that the spouses could legally form a business partnership. Section 158, Civil Code. It is important to bear in mind, however, that no contribution or consideration, in money or money's worth or services, is necessary to acquire an interest in such a partnership, whether the income is to be divided or owned in joint tenancy. Thus, in *Wilson v. Commissioner,* 11 B. T. A. 963, involving income taxes of the members of a family partnership consisting of three husbands and their wives, it was held that each one of the six owned one-sixth of the income and should pay the tax thereon. In so holding, the Board on page 970 says:

> "The respondent, however, contends that since the wives contributed neither money nor services, they never became members of the partnership."

The answer by the Board to this contention on page 971 was:

> "Inasmuch as the Civil Code of California contains no provision whereby it is essential to the formation of a valid partnership that the members contribute any money or services . . . we do not think that the respondent's contention is well taken."

In a partnership between the spouses it will not be presumed that either is to be paid for his or her services in the absence of a clear-cut agreement to that effect or that the services of either is to constitute a consideration for an interest in the partnership where no consideration is necessary. Furthermore, all community expenses of the family including two daughters [R. 475] were to be paid out of the partnership funds, the partnership consisting of the business as well as the home. [R. 238.] It does not appear that the wife rendered any more service than if she had confined her attention to her home. They simply deemed it advisable for her to perform a different kind of service and hire domestic help [R. 474], one servant all the time and extra help, laundress, woman that came in to do cleaning, etc. One servant was paid $80.00 per month and the others were paid by the hour, totaling well over one hundred dollars ($100.00) per month. What woman would not prefer to perform the services performed for the partnership by the wife rather than to do all the ordinary housework, cleaning and laundry?

Furthermore, it does not appear that the services of a woman capable of performing the services performed by decedent for the business could not have been secured for less than the amounts paid to the said servant, cleaning woman and laundress.

That the parties did not understand that the wife's interest in the business was in return for her services is shown by appellee's testimony. [R. 253.] In answer to a direct question he replied: "Well, that sounds kind of odd to me because I don't know why either her or I would put that out." And when asked the further question: "You question that now?", he replied: "I would."

IV.

There Is No Inconsistency in the Evidence Offered and the Decision Rendered in the Income Tax Matters, Kammerdiner v. Commissioner, 25 B. T. A. 495, and the Evidence Offered and Decision Rendered in the Instant Matter.

Appellant's contention on this point is contained in the second paragraph on page 17 of his brief and reads as follows:

> "The conclusion of the District Court that the rotary jar business was old-type community property prior to January 3, 1928, cannot stand, because the Board of Tax Appeals in a prior decision which was *res judicata* had decided that the business was not community property during 1925, 1926 and 1927, by virtue of an oral agreement in 1923 creating a partnership."

As hereinbefore stated, the District Court reached no such conclusion. The conclusion of the Court is expressed in its minute order [R. 54] to the effect that the joint tenancy created in 1928 confirmed "the *oral* agreement of 1923." (Italics supplied.) In other words, the *written* agreement of 1928 continued the *oral* agreement of 1923. The pertinent finding expresses the conclusion even more clearly. It is finding VI. [R. 60.] The finding is

not that the business in which decedent owned an interest as joint tenant at the time of her death was created in 1928. The finding is that it was "referred to in said agreement of January 3, 1928." This very clearly indicates a business in existence prior to the 1928 agreement which refers to it. In this connection it will be noted that the written agreement or statement [R. 44] is in regard to the ownership of the *spouses* in the business "heretofore conducted by them."

It will tend to clarify the situation with reference to both suits to first consider the income tax returns for 1928. Each spouse returned one-half of the income as a member of a partnership. [R. 417.] In a letter of May 15, 1930 [R. 269] the Internal Revenue Agent in charge of the Los Angeles office of the Treasury Department proposed adjustments based on the report of an examining agent [R. 27] that the written agreement of January 3, 1928, was not a partnership agreement but "in fact is a joint tenancy agreement." The taxpayer in his protest stated [R. 281] that the agent was "perfectly correct in denominating it a joint tenancy agreement." He contended, however, that as joint tenants the spouses had a right to each return one-half of the income. This contention was conceded to be correct in the letter of the Internal Revenue Agent in charge bearing date of April 22, 1931. [R. 285, 286.] It will be noted that this ruling by the taxing authorities was based squarely on the written agreement of January 3, 1928, a copy of which was in the hands of the Government, and that the final determination in said matter was made prior to the trial in the Board of Tax Appeals involving the income taxes for the years 1925, 1926 and 1927, the returns for which were

prepared as partnership returns by a person not an attorney. [R. 294, 452.] The fact that the return was prepared by a person other than an attorney will be given consideration by the Court. *Dollar v. Commissioner,* 41 B. T. A. 869, 875.

The trial before the Board began on June 10, 1931. The testimony [R. 453, 454, 455, 456] was to the effect that the taxing authorities would not recognize the oral partnership agreement of April, 1923, unless and until it was reduced to writing; that it was reduced to writing on January 3, 1928, and under it the spouses were permitted to divide the income in their returns for the year 1928; that the written agreement did not change the agreement of April, 1923. As hereinbefore stated, a copy of the written agreement was then in the possession of the Government. Neither side offered said written agreement in evidence.

The opinion, 25 B. T. A. 495, states: "The only issue is whether the petitioner and his wife were equal partners in a certain business throughout the taxable years." Held that they were; that the capital required for the business was drawn from their joint bank account in which had been deposited the savings from the husband's salary over the years since marriage and from the boarding house; and that the receipts of the business were deposited in this account. That the partners were "to share equally in the profits or losses therefrom." The Board on page 497 says:

> "In this proceeding it is perfectly clear that the petitioner and his wife joined together in April of 1923 to carry on a business enterprise for their mutual benefit. This is sufficient to establish a partnership."

There is no specific finding as to how the partners were "to share equally in the profits or losses." That is, whether the profits were to be divided each one taking a share and paying out of said share one-half of the losses, or whether they were to "share equally in the profits" in excess of the losses by taking and keeping them in joint tenancy. However, if all bills were payable out of the joint account and the receipts of the business to be deposited therein, they necessarily owned them as joint tenants. It was not necessary in said matter to find whether the income was to be divided or to go into the joint bank account which would be owned by them equally as joint tenants. In either case the income would be divided for income tax purposes. There is clearly no finding of a partnership, joint tenancy or otherwise or of separate property prior to the rotary jar business. The finding is:

> "*After the usefulness of such device had been proved by successful tests* he formed a partnership with his wife." (Italics supplied.)

In the instant matter, however, the Court having found the existence of the joint tenancy at the date of death, it was necessary for estate tax purposes to find as to the *original* ownership of the funds belonging to the joint tenants; that is, who owned them before they were deposited in the joint bank account out of which the joint tenancy partnership business was financed. The taxpayer relied on precisely the same written and oral agreement in each case and the decisions in the two cases are not at all inconsistent.

V.

Taxpayer Will Not Be Penalized Because He Erroneously Returned and Paid a Tax.

On page 24 of his brief appellant points out that if appellee's contention is correct no estate tax should have been paid in this matter as the joint tenancy properties returned, one-half of which were included in the gross estate on which the tax was computed were either held in joint tenancy prior to the 1923 agreement or were purchased with the profits of said business. This is conceded. Why they were thus returned we can only surmise, as taxpayer was then represented by other counsel. It seems probable that they were included on the supposition that one-half of joint tenancy property was taxable regardless of its ownership before going into joint tenancy, overlooking the statute making its inclusion dependent on its source. The joint tenancy assets of the business are mentioned but valued at nil, on the theory that the patents were not assets of the business but were the property of appellee. The tax erroneously returned and paid was $4,-332.27 [R. 21], while the deficiency finally determined [R. 46] was $22,090.65. Is it astonishing that with the employment of different counsel in relation to the deficiency and the contest over $22,090.65, the erroneous payment of $4,332.27, was not earlier discovered?

The fact that it was erroneously returned and the tax paid cannot be taken as an admission that it was not originally community property. *Dollar v. Commissioner*, 41 B. T. A. 869, 875.

Furthermore, as hereinbefore shown, it was the basic patent, shutting off competition, that enabled the business to earn the enormous profits represented by the joint ten-

ancy properties returned in Form 706. Therefore, if by any chance it should be held that the patents were part of the assets of the business and that the value of decedent's services over and above the amount paid by the business for home servants, cleaners and laundresses, was to that extent a consideration for her interest in the business, the proportionate part of the value of the business and its profits allocable to such excess services, if any, would be so slight that the estate tax was nevertheless far overpaid by the payment of said $4,332.27 so that there would be no deficiency. This is true regardless of whether the patents were separate or community property, for if it should be determined that all of the patents were originally community property, the only thing of value protected by them was the exclusive use of the rotary jar, a product of appellee's brain, invented prior to 1923, and therefore community property acquired prior to July 29, 1927, and, as stated on page 19 of appellant's brief, owned entirely by the husband [appellee], in which decedent had a mere expectancy contingent on her surviving him.

Conclusion.

The judgment is supported by the ultimate facts found which in turn are supported by ample evidence. The judgment should therefore be affirmed.

Respectfully submitted,

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